STATE OF MICHIGAN
IN THE SUPREME COURT

GARY L. BUSH, Guardian of GARY E. BUSH, a Protected Person,
Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D., GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,
Defendants,

and

JOHN CHARLES HEISER, M.D., and WEST MICHIGAN CARDIOVASCULAR SURGEONS,
Defendants-Appellants

SC: 136617
COA: 274709
Kent CC: 06-000982-NM

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AMICUS CURIAE BRIEF OF THE UNIVERSITY OF MICHIGAN IN SUPPORT OF APPELLANTS

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GARY L. BUSH, Guardian of GARY E. BUSH,
a Protected Person,
Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D.,
Defendant-Appellant,

and

JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., VASCULAR ASSOCIATES, P.C., and SPECTRUM HEALTH BUTTERWORTH CAMPUS,
Defendants.

SC: 136653
COA: 274708
Kent CC: 06-000982-NM

GARY L. BUSH, Guardian of GARY E. BUSH,
a Protected Person,
Plaintiff-Appellee,

v

BEHROOZ-BRUCE SHABAHANG, M.D., JOHN CHARLES HEISER, M.D., WEST MICHIGAN CARDIOVASCULAR SURGEONS, GEORGE T. SUGIYAMA, M.D., M. ASHRAF MANSOUR, M.D., and VASCULAR ASSOCIATES, P.C.,
Defendants,

and

SPECTRUM HEALTH BUTTERWORTH CAMPUS,
Defendant-Appellant.

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SC: 136983
COA: 274726
Kent CC: 06-000982-NM

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STATEMENT IDENTIFYING THE INTEREST OF AMICUS CURIAE UNIVERSITY OF MICHIGAN

The University of Michigan Health System includes the University of Michigan Medical School and its faculty group practice, three University of Michigan hospitals, the clinical activities of the University of Michigan School of Nursing, approximately 30 health centers and 120 outpatient clinics, and the Michigan Health Corporation. As one of the largest health care systems in the state, the University of Michigan Health System has a compelling interest in the state of the law affecting health care providers and institutions.

In the order granting leave to appeal, this Court stated the issue as:

> (1) whether the plaintiff's defective notice of intent as to defendants West Michigan Cardiovascular Surgeons and Spectrum Health tolled the period of limitations pursuant to MCL 600.5856(c), as amended by 2004 PA 87, effective April 22, 2004.

There are several cases against the University of Michigan and its employed health professionals which involve this issue. The issue was raised and decided by the Court of Appeals in *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309; 760 NW2d 699 (2008). After determining that the amended notice-tolling provision should be applied, the panel held that the statute of limitations was not tolled pursuant to MCL 600.5856 (c) because the notices of intent did not comply with MCL 600.2912b. *Id.* 280 Mich App at 324-328. The plaintiff's application for leave to appeal is being held in abeyance pending the decision in this case. [No. 137409, Order 3/25/09]

POSITION OF AMICUS CURIAE UNIVERSITY OF MICHIGAN

The University of Michigan supports the position taken by defendants-appellants Spectrum Health Butterworth Campus, West Michigan Cardiovascular Surgeons, John Heiser, M.D., and Behrooz-Bruce Shabahang, M.D.

As amicus, the University maintains that the statute of limitations is not tolled during the notice-waiting period under MCL 600.5856(c) unless the notice of intent complies with MCL 600.2912b. In response to the question framed by the order granting leave, the University contends that the amendment to MCL 600.5856, enacted as 2004 PA 87, does not affect the holdings in *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002) and *Boodt v Borgess Medical Center,* 481 Mich 558; 751 NW2d 44 (2008).

The order granting leave specified a second issue:

> (2) whether defendant Shabahang's defective response to the plaintiff's notice of intent, MCL 600.2912b(7), was presumed valid such that the plaintiff was required to wait the full 182-day period before filing his medical malpractice action.

The University of Michigan does not take a position on the second issue.

In the briefs on appeal, the parties discuss whether the notices of intent comply with the content requirements of MCL 600.2912b(4). Because leave to appeal was not granted on that issue and because the determination is fact-specific, the University of Michigan does not take a position as to whether plaintiff's notices of intent comply with MCL 600.2912b(4).

STATEMENT OF FACTS

For purposes of presenting the University's position as amicus, the relevant facts are few.

Gary Bush underwent surgery on August 7, 2003, and was hospitalized until August 29, 2003. Any alleged acts of malpractice occurred between those dates.

Notices of intent were sent to the defendants on August 5, 2005. The complaint was filed on January 27, 2006.

The complaint was filed more than two years after the alleged acts of malpractice. Unless the two-year malpractice statute of limitations was tolled, the complaint was untimely under MCL 600.5805(6).

ARGUMENT

Introduction

The notice of intent requirement in MCL 600.2912b serves an important and salutary function. To comply with the statute, a potential plaintiff must gather the relevant information, review the actions and omissions of the involved health professionals and facilities, evaluate the care and treatment against the applicable standard of care, and assess the causal relationship to any claimed injury or damages. After this screening process, the potential plaintiff must then inform the health professionals and facilities about the nature and substance of the claim. The notice must contain sufficient information to allow a meaningful assessment by the potential defendants. If both sides comply with the statute, then settlement without litigation becomes a realistic prospect.

The language of MCL 600.2912b and 600.5856 demonstrates the Legislature's intent to enforce the presuit notice requirement and accomplish its goal "to encourage settlement without the need for formal litigation." *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 715; 575 NW2d 68 (1997). MCL 600.2912b(1) unambiguously states that "a person ***shall not commence an***

action alleging medical malpractice . . . ***unless the person has given*** the health professional or health facility ***written notice under this section*** . . . before the action is commenced." (emphasis added) To accommodate the potential dilemma for a person unable to commence an action while the limitations period is expiring, MCL 600.5856(c) allows for tolling "at the time notice is given in compliance with the applicable notice period under section 2912b."

In *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 701; 684 NW2d 711 (2004) (*Roberts II*) and *Boodt v Borgess Med Ctr,* 481 Mich 558, 562-563; 751 NW2d 44 (2008), this Court held that compliance with MCL 600.2912b requires a potential claimant to make good faith averments of the information required by subsection (4) in a manner consistent with the early stage of the proceedings. In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 64, 642 NW2d 663 (2002) (*Roberts I*) and again in *Boodt*, 481 Mich at 561-564, this Court held that tolling under MCL 600.5856 is only available to a person who complies with MCL 600.2912b. These cases correctly interpret the statutory language and appropriately implement the Legislature's approach for encouraging settlement without litigation.

The amendment to MCL 600.5856, enacted as 2004 PA 87, does not change either the substantive language or the legislative goals. As recognized in *Roberts I* and *Boodt*, compliance with MCL 600.2912b is the prerequisite for tolling under MCL 600.5856. As amicus, the University believes that the language of amended notice-tolling provision leads to the same result.

The University of Michigan maintains a comprehensive program for prelitigation review and settlement of potentially meritorious malpractice claims. Its published claims management principles state:

> We will compensate quickly and fairly when inappropriate medical care causes injury.
>
> We will defend medically appropriate care vigorously.[1]

The University follows a detailed process for reviewing potential claims with the goal of determining at an early stage whether claims should be promptly settled or vigorously defended. A summary of the University's approach to medical malpractice and patient safety recognizes the role played by the notice of intent requirement:

> Our state law, among other things, builds a six-month "cooling off" period into the malpractice lawsuit process. If a patient is thinking about bringing suit against a doctor or hospital for medical malpractice, the patient must first alert prospective defendants of their complaints with a "notice of intent," and both parties then have six months to consider their cases before going to court. UMHS systematically uses that period to investigate complaints and establish a dialogue with our patients, and their attorneys if they are represented, which often eliminates their need to resort to litigation.[2]

The effectiveness of this program depends on the meaningful enforcement of the presuit notice requirements as interpreted in *Roberts I*, *Roberts II* and *Boodt*. If a patient or a patient's representative does not provide adequate information regarding a potential claim, the University's ability to thoroughly review and assess the medical care and the patient's injury is significantly compromised. If a person's noncompliance with MCL 600.2912b has no consequence, then there will be less incentive to responsibly participate in this process, frustrating both the legislative goal and the University's commitment to transparency and accountability.

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[1] Testimony of Richard C. Boothman, Chief Risk Officer, University of Michigan Health System before the United States Senate Committee on Health Education, Labor and Pensions, June 22, 2006, p. 5 [Exhibit A]

[2] Medical Malpractice and Patient Safety at UMHS <http://www.med.umich.edu/news/newsroom/mm.htm#summary> (accessed March 25, 2009) [Exhibit B]

In prepared testimony before the United States Senate Committee on Health, Education, Labor and Pensions, the University's chief risk officer stated:

> G. Litigation was never meant to be the first resort for resolving disputes. Reform must offer the opportunity, incentive or if necessary, impose a requirement that the parties talk to each other before resorting to litigation as a means for resolving disputes. The Michigan scheme offered the opportunity and it is now increasingly used, but for the first ten years few insurance carriers or hospital systems availed themselves of that opportunity. Perhaps more than any other feature to the UM's approach, we have found that the free and credible exchange of information is responsible for the UM's success. All parties deserve to know that every opportunity to resolve the misunderstanding, dispute, or claim has been made before litigation is invoked.[3]

The information required by MCL 600.2912b(4) provides the basics for presuit assessment of potential claims. The meaningful enforcement of those requirements, as provided by MCL 600.2912b(4) and 600.5856(c), is an essential component of the Legislature's approach. The University is concerned that eliminating any consequences for noncompliance with MCL 600.2912b(4) would substantially undermine the goal of encouraging serious and meaningful presuit review and settlement of meritorious claims.

Standard of Review

The trial court's grant of summary disposition is reviewed de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 750; 691 NW2d 424 (2005). Whether a statute of limitations was tolled and when the limitations period expired are questions of law and reviewed *de novo*. *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005).

[3] Testimony of Richard C. Boothman, n 1 *supra,* p. 9 [Exhibit A].

I. Prior to the 2004 amendment, the notice-tolling provision only applied when a plaintiff's notice of intent complied with MCL 600.2912b.

As noted, this Court has previously held that "a defective notice of intent does not toll the period of limitations." *Boodt*, *supra*, 481 Mich at 561 (citing *Roberts I*, *supra*, 466 Mich at 64) In *Roberts I*, this Court explained the statutory basis for that holding.

First, "[t]he notice of intent required for medical malpractice actions is statutorily mandated." *Id.* 466 Mich at 65. MCL 600.2912b(1) provides:

> [A] person ***shall not commence an action*** alleging medical malpractice against a health professional or health facility ***unless the person has given*** the health professional or health facility ***written notice under this section*** not less than 182 days before the action is commenced. (emphasis added)

Second, the statute dictates the requirements of the mandatory notice. MCL 600.2912b(4) "provides that '[t]he notice given to a health professional or health facility under this section ***shall*** contain a statement of ***at least***' the facts, standard of care, action that should have been taken, breach, proximate cause, and the names of those being notified." *Id.* (emphasis in original).

Taken together, the subsections "clearly place the burden of complying with the notice of intent requirements on the plaintiff." *Id.* at 66.

> The phrases "shall" and "shall not" are unambiguous and denote a mandatory, rather than discretionary action. . . . Likewise, the phrase "at least" plainly reflects a minimal requirement and cannot plausibly be considered ambiguous. Because § 2912b is unambiguous, we must enforce its plain language.
>
> *Id.* at 65-66 (citation omitted)

The discussion of the tolling provision similarly focused on the statutory language. MCL 600.5856(d) provided for tolling "after the date notice ***is given in compliance with section 2912b***." *Id.* at 62 (emphasis in original). This Court rejected an argument that the highlighted

phrase indicated the Legislature's intent that "only the *delivery* provisions of § 2912b [were] applicable to § 5856(d)." *Id.* at 62 (emphasis in original).

> Section 5856(d) clearly provides that notice must be compliant with § 2912b, not just § 2912b(2) as plaintiff contrarily contends. Had the Legislature intended only the delivery provisions of § 2912b to be applicable, we presume that the Legislature would have expressly limited compliance only to § 2912b(2). However, the Legislature did not do so. Rather, it referred to all of § 2912b.
>
> *Id.* at 64.

As a result, tolling under former MCL 600.5856(d) required a plaintiff to give a notice of intent that complied with MCL 600.2912b, including the statement as to the matters required by subsection 2912b(4). *Id.* at 63.

In *Boodt*, this Court found that the plaintiff's notice of intent failed to comply with MCL 600.2912b(4), and therefore, no tolling resulted under former MCL 600.5856(d). The plaintiff advanced an alternative argument. Because the complaint and affidavit of merit were filed within two years after the alleged malpractice, the plaintiff asserted that the limitations period was tolled under MCL 600.5856(a). *Boodt*, 481 Mich at 561-562.[4] This Court focused on the unambiguous language of MCL 600.2912b(1) which provides that a person "shall not commence an action . . . unless the person . . . has given written notice under this section."

> Therefore, a plaintiff cannot commence an action before he or she files a notice of intent that contains all the information required under § 2912b(4). See *Roberts I*, 466 Mich at 64; 642 NW2d 663 (holding that the period of limitations is not tolled unless notice is given in compliance with all the provisions of § 2912b[4]). In this case, however, plaintiff failed to file a notice of intent that satisfied the requirements of § 2912b(4)(e), and, thus, plaintiff was not yet authorized to file a complaint and an affidavit of merit. Therefore, the filing of the complaint and the affidavit of merit that plaintiff was not yet authorized to file could not possibly have tolled the period of limitations.

[4] The alleged malpractice occurred on October 6, 2001. The complaint was filed on June 19, 2003, less than two years afterwards.

Id. at 563-564.

As discussed in Section IV, *Boodt*'s holding as to MCL 600.5856(a) is not raised by this case since plaintiff's complaint was filed more than two years after the alleged malpractice.[5]

II. The amendment to MCL 600.5856 did not change the language which requires a plaintiff to give notice in compliance with MCL 600.2912b in order to rely on the tolling provision.

The language of MCL 600.2912b has not changed. Subsection (1) still provides that a person "shall not commence an action" unless "written notice under this section" is given to a health professional or facility. And, subsection (4) still mandates that "notice given . . . under this section shall contain a statement" as to specific matters.

The amendment to MCL 600.5856 did not change the substance of the notice-tolling provision.

As enacted in 1993 PA 78, MCL 600.5856 provided:

> The statutes of limitations or repose are tolled:
>
> ***
>
> (d) If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.

As amended by 2004 PA 87, MCL 600.5856 provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> ***
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled

[5] The application of MCL 600.5856(a) is also not presented in *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309; 760 NW2d 699 (2008). The alleged malpractice occurred in July 2003. The complaint was filed on January 20, 2006.

not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

Both versions only permit tolling if the statute of limitations or repose would expire during the notice-waiting period. *Mayberry v General Orthopedics, PC,* 474 Mich 1, 8-9; 704 NW2d 69 (2005). Both provide for tolling "for not longer than a number of days equal to the number of days in the applicable notice period" or 182 days. *Omelenchuk v City of Warren*, 461 Mich 567, 575; 609 NW2d 177 (2000), overruled in part on other grounds *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

The prior version stated that tolling began "after the date notice is given in compliance with section 2912b." A notice "given in compliance with section 2912b" must comply with the entire section. *Roberts I*, 466 Mich at 64.

The current statute provides for tolling "[a]t the time notice is given in compliance with the applicable notice period under section 2912b." The applicable notice period in this case, and in most malpractice cases, is 182 days under MCL 600.2912b(1).[6] That provision requires a person to "give[] the health professional or health facility ***written notice under this section*** not less than 182 days before the action is commenced." (emphasis added)

Thus, for notice to be "given in compliance with the applicable notice period under section 2912b," it must be "written notice ***under this section***." (emphasis added) "This section" includes MCL 600.2912b(4) which requires that "[t]he notice given . . . under this section shall contain a statement of at least all of" the six matters identified in subparagraphs (a) through (f).

[6] The notice period can be shortened to 91 days under MCL 600.2912b(3). However, the shortened period is only available if a claimant "has previously filed the 182-day notice required in subsection (1)" against other health professionals or facilities. MCL 600.2912b(3)(a). If the waiting period has expired and a complaint has been filed, then the notice period is shortened to 91 days as to potential parties which could not have been reasonably identified. MCL 600.2912b(3)(b)-(d).

The grammatical rearrangement of the notice-tolling provision did not change the substantive requirement for tolling, *i.e.,* the giving of written notice in compliance with MCL 600.2912b.

The Court of Appeals has reached the same conclusion. *Shember v Univ of Michigan Med Ctr*, 280 Mich App 309; 760 NW2d 699 (2008). After determining that the amended act applied, the panel concluded:

> Nonetheless, we find no merit to plaintiff's argument that the amended statute substantively changed the effect of the presuit notice tolling provision. An unambiguous statute is enforced according to its plain language. . . . ***2004 PA 87 did not change the substance of the presuit notice tolling provision.***
>
> *Id.* at 324 (citation omitted and emphasis added).

Other panels reached the same interpretation in unpublished opinions. *Asbury v Sinai Hosp of Greater Detroit*, unpublished opinion per curiam of the Court of Appeals, issued Feb 22, 2007 (Docket No. 261533)(O'Connell, PJ, and Saad and Talbot, JJ) (tolling statute "was reworded in a manner that does not alter the subsection's meaning"); *Worthing v McLaren Reg'l Med Ctr*, unpublished opinion per curiam of the Court of Appeals, issued Aug 7, 2007 (Docket No 258041)(Cavanagh, PJ, and Hoekstra and Markey, JJ)(statute was "reworded in a manner that does not change the substantive meaning of the provision. . . "); *Rheinschmidt v Falkenberg*, unpublished opinion per curiam of the Court of Appeals, issued March 30, 2006 (Docket No. 261318) (Smolenski, PJ, Whitbeck, CJ and O'Connell, J) (same); *Myers v Marshall Medical Associates, PC*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2006 (Docket No. 264667) (Smolenski, PJ, Whitbeck, CJ and O'Connell, J) (same).

III. The amendment to MCL 600.5856 was not intended to change the notice-tolling provision.

Even if the 2004 amendment resulted in any ambiguity in the notice-tolling provision, the history of 2004 PA 87 demonstrates that the Legislature did not intend to make any substantive changes.

This Court decided *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003), on July 1, 2003. The decision overruled the interpretation of MCL 600.5856 that had been in effect since *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971), overruled in part on other grounds by *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). The holding was given limited retroactive application to cases in which the issue had been raised and preserved and prospective application effective on September 1, 2003. *Gladych*, 468 Mich at 607-608.

SB 990 was introduced on February 12, 2004. [Exhibit C] The bill progressed through the Legislature with ease. The House offered minor amendments. A reference in section 5856(a) regarding the time for serving a complaint and summons was changed from "the court rules" to "the supreme court rules." An enacting section was added.[7] [Exhibit D] All of the Senate and House votes were unanimous. [Exhibit E]

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[7] The enacting section states:

> (1) Except as provided in subsection (2), this amendatory act applies to civil actions filed on or after the effective date of this amendatory act.
>
> (2) This amendatory act does not apply to a cause of action if the statute of limitations or repose for that cause of action has expired before the effective date of this amendatory act.

The legislative analyses by the Senate and House Fiscal Agencies only discuss the amendment of Section 5856(a) and the deletion of former Section 5856(c) in response to *Gladych*.

The notice-tolling provision is only mentioned briefly. The HFA analysis refers to it as one of four circumstances for tolling under the existing statute, *i.e.*, "for a specified time period under certain circumstances pertaining to medical malpractice actions." [Exhibit F] The SFA enrolled analysis states:

> The Act also provides that the statute of limitations is tolled at the time jurisdiction is otherwise acquired over the defendant; and at the time notice is given in compliance with the applicable notice period under MCL 600.2912b (which applies to medical malpractice actions), if during that period a claim would be barred by the statute of limitations. ***The bill did not amend these provisions.***
>
> [Exhibit G (emphasis added)]

The role of legislative history in statutory interpretation has been extensively reviewed by this Court in recent years. As a threshold principle, legislative history cannot alter the meaning of unambiguous statutory language. *In re Certified Question*, 468 Mich 109; 116; 659 NW2d 597 (2003). However, this Court has recognized the usefulness of legislative history which supports a reasonable inference that "the Legislature intended to repudiate the judicial construction of a statute." *Id.* at 115 n 5 (citing *Detroit v Walker*, 445 Mich 682, 697; 520 NW2d 135 (1994)). While legislative staff analyses have limited value for interpreting specific statutory language, *id.* they are helpful to demonstrate the Legislature's general purpose for enacting a statute. *North Ottawa Community Hosp v Kieft,* 457 Mich 394, 406 n 12; 578 NW2d 267 (1998).

Based on the timing of 2004 PA 87 and the legislative analyses, there is no question that the amendment was a response to *Gladych*. And importantly for this case, there is also no question that the amendment had nothing to do with changing the outcome in *Roberts I*.

IV. The written presuit notice must comply with MCL 600.2912b in order for tolling to result under MCL 600.5856(c).

As discussed in Section II, the 2004 amendment did not change the substantive language of the notice-tolling provision. Therefore, the analysis of the related provisions of MCL 600.2912b and MCL 600.5856, as performed in *Roberts* and *Boodt*, remains sound.

Plaintiff's arguments overlook a critical aspect of the analysis – the statute that was *not amended*. Both before and after MCL 600.5856 was amended, MCL 600.2912b(1) provided that "a person ***shall not commence an action*** alleging medical malpractice . . . ***unless the person has given*** . . . ***written notice under this section*** not less than 182 days before the action is commenced." (emphasis added) This language "unequivocally" provides that "a person 'shall not' commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period." *Burton, supra,* 471 Mich at 752. The mandatory nature of MCL 600.2912b has been consistently recognized. See, *e.g.*, *Omelenchuk, supra,* 461 Mich at 572; *Boodt*, 481 Mich at 562-563.

In an apparent effort to gain distance from this mandatory language, plaintiff asserts that MCL 600.2912b is not a tolling statute. [Plaintiff's brief in response, No. 136617, p. 35] While this may be correct, it overlooks the direct connection between the notice-waiting period and the notice-tolling provision. "However, like former MCL 600.5856(d), MCL 600.5856(c) links the tolling period to the applicable notice period." *Vanslembrouck ex rel Vanslembrouck v Halperin,* 277 Mich App 558, 572; 747 NW2d 311 (2008) (amendment did not alter prior holdings that the limitations period is tolled for 182 days even if plaintiff could file earlier under MCL 600.2912b(8) or (9)).

The term "notice" in MCL 600.5856(c) must be interpreted as the "notice" required by MCL 600.2912b. The connection between the statutes is explicit – MCL 600.5856(c) directly

refers to MCL 600.2912b. Both statutes deal with the same subject, *i.e.,* the notice of intent requirement. *Palmer v State Land Office Bd*, 304 Mich 628, 636-637; 8 NW2d 664 (1943); *In re MCI Telecommunications Complaint*, 460 Mich 396, 416; 596 NW2d 164 (1999). The relationship is further established by the simultaneous enactment of the presuit notice requirement and the prior notice-tolling provision in 1993 PA 78. *Van Antwerp v State*, 334 Mich 593, 605-606; 55 NW2d 108 (1952) (statutes enacted on the same date and related to the same subject are construed together).

In the same way, the meaning of the "written notice under this section" required by MCL 600.2912b(1) is the same as the "notice given to a health professional or facility under this section" described in MCL 600.2912b(4). Subsections of a statute are read as part of a whole rather than separately. *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 167-168; 680 NW2d 840 (2004); *Grand Rapids v Crocker*, 219 Mich 178, 182-183; 189 NW 221 (1922).

Lacking support in the statutory language, plaintiff essentially argues that ***any*** notice of intent should toll the statute of limitations. Otherwise, according to plaintiff, "there is the prospect that the entire case may be eliminated for some tiny, technical error." [Plaintiff's response brief, No. 133617, p. 38] This argument focuses to a large extent on a question as to which leave was not granted, *i.e.,* whether the standard for compliance with MCL 600.2912b(4) established by *Roberts II* and *Boodt* is soundly based in the statutory language. By asserting that dismissal can result from a "tiny, technical error," plaintiff apparently views the standard as far too demanding.

The University disagrees. *Roberts II* allows for considerable leniency and flexibility at the early stage, requiring only a good faith effort and accepting inaccurate or erroneous statements. *Id.*, 470 Mich at 691-692. The standard accommodates the uncertainties inherent

when notice is given while enforcing the requirements established in MCL 600.2912b(4). The standard also advances the Legislature's determination that potential defendants must be placed "on notice as to the nature of the claim against them." *Id.* at 700-01.

However, the standard for compliance with MCL 600.2912b(4) is not an issue on which leave was granted. Nor does the debate over the standard from *Roberts II* and *Boodt* have to be considered in order to determine the effect of the 2004 amendments to MCL 600.5856. Instead, the only question is whether a notice that does not comply with MCL 600.2912b tolls the limitations period under the current version of MCL 600.5856(c).

Under the prior notice-tolling provision, this Court held that a complaint must be dismissed if the plaintiff did not give any notice of intent. *Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 47; 594 NW2d 455 (1999). Plaintiff does not appear to argue that the 2004 amendment changed that holding. The current statute explicitly conditions tolling on giving notice, *i.e.,* the statutes of limitations and repose are tolled "[a]t the time notice is given in compliance with the applicable notice period under section 2912b. . ."

If MCL 600.5856(c) does not result in tolling when ***no*** notice is given, the question is whether the limitations period is tolled as long as ***any*** notice is given, regardless of its compliance with MCL 600.2912b.

Assume that a document is sent with a single sentence: "This is a notice of intent to file an action for malpractice." Would a document with ***no*** statement as to any of the required topics in MCL 600.2912b(4) toll the statute? Assume another document stating, "This a notice of intent to file an action for malpractice. The claimant objects to providing any information about the potential claim." Would that type of notice toll the statute of limitations? Progress to the next level: "This a notice of intent to file an action for malpractice against Dr. Jones and ABC

Hospital based on their negligent treatment of Ms. Smith." Would that notice suffice under the tolling provision?

A progression of hypothetical notices can be offered, going from a notice with no information to a notice meeting the standard established in *Roberts II* and reaffirmed in *Boodt*, *i.e.,* a good faith averment of the required information consistent with the early stage of the proceedings. Certainly, the standard for determining a notice's sufficiency has been controversial. However, there is no statutory basis for distinguishing between a notice sufficient to comply with MCL 600.2912b and a notice sufficient to allow tolling under MCL 600.5856(c).

V. The tolling available when a complaint is filed and served under MCL 600.5856(a) does not apply.

As another way to avoid the consequences of not complying with MCL 600.2912b, Plaintiff asserts that subsection (a) is the relevant provision of MCL 600.5856, rather than subsection (c). According to her brief, the "language of § 5856(a) is unequivocal. It provides that statutes of limitations are tolled when a complaint is filed and service is effectuated." [Plaintiff-appellee's response brief, No. 136617, p 34] As a result, plaintiff argues, "§ 5856(a) allows for tolling irrespective of whether or not there has been compliance with the notice of intent." [*Id.* p 35]

This is the same argument raised and rejected in *Boodt,* 481 Mich at 562-564. The tolling provision in MCL 600.5856(a) was only relevant in *Boodt* because the complaint was filed within the two-year malpractice statute of limitations. MCL 600.5805(6).

However, the tolling allowed under MCL 600.5856(a) is not available to plaintiff. The alleged acts of malpractice occurred between August 7 and August 29, 2003. Unless tolled under MCL 600.5856(c), the two-year limitations period expired no later than August 29, 2005. The complaint was not filed until January 17, 2006.

If plaintiff's noncompliant notice did not toll the limitations period under MCL 600.5856(c), then filing his complaint would not result in tolling under MCL 600.5856(a). Tolling suspends the running of a limitations period; it does not revive an expired one. 51 Am Jur 2d, Limitation of Actions, § 169 (2008) ("'Tolling' refers to suspending or stopping the running of a statute of limitations; it is analogous to a clock stopping, then restarting.").[8] See, *Waltz v Wyse*, 469 Mich 642, 652; 677 NW2d 813 (2004) (no tolling results when a notice of intent is given after the statute of limitations has expired).

The theme of plaintiff's argument is that *Boodt* has effectively rewritten MCL 600.5856(a), so that it reads, "the statute of limitations is tolled when a claim is filed and served on a defendant *provided that in a medical malpractice action, a Notice of Intent which complies with § 2912b was mailed to defendant.*" [Plaintiff's response brief, No. 136983, p. 29 (emphasis in original)]. While the University disagrees with that interpretation of *Boodt,* the question is not presented by the facts in this case. Unlike *Boodt*, plaintiff's complaint was filed more than two years after the alleged malpractice. Whether *Boodt* was correctly decided or not, plaintiff cannot invoke tolling under MCL 600.5856(a) to reinstate an expired statute of limitations based on an untimely filed complaint.

[8] See also, *e.g.*, *Webster v Moore*, 199 F3d 1256, 1259 (CA11 2000)(post-conviction motion filed after the limitations period has expired cannot toll the statute "because there is no period remaining to be tolled"); *Vroman v Brigano*, 346 F3d 598, 602 (CA6 2003) (tolling provision does not "'revive' the limitations period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run.")

CONCLUSION

In response to this Court's question, the University of Michigan maintains that plaintiff's deficient notice of intent did not toll the period of limitations pursuant to MCL 600.5856(c), as amended.

2004 PA 87 was a response to *Gladych*, intended to clarify the requirements for tolling based on filing and serving a complaint. The notice-tolling provision only underwent minor grammatical changes. The substantive requirements for tolling during the notice-waiting period were not altered. Tolling occurs under MCL 600.5856(c) "at the time notice is given in compliance with the applicable notice period under section 2912b." Compliance requires a "written notice under this section," which includes a statement of the content mandated in MCL 600.2912b(4).

As amicus, the University of Michigan encourages this Court to hold that compliance with MCL 600.2912b is required for tolling under MCL 600.5856(c). The 2004 amendment did not change the substantive language and did not diminish the role of sufficient notices in advancing settlement of potential malpractice claims without the burdens of litigation.

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